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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 268.

MISSOURI-KANSAS PIPE LINE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, *et al.*

No. 269.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, *et al.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Opinions Below.

In No. 268, in which Missouri-Kansas Pipe Line Company is appellant, no opinion was written by the District Court.

In No. 269, in which Panhandle Eastern Pipe Line Company is appellant, the opinion of the Court below is reported at 32 Fed. Supp. 474, and is printed in the Record at pages 520-526.

Grounds of Jurisdiction.

These are appeals from two orders of the District Court for the District of Delaware, both entered April 23, 1940, denying applications of the appellants for relief as provided by the terms of a consent decree entered in a suit brought by the Attorney General to prevent and restrain violations of the Sherman Act and the Clayton Act (R. 541, 565).

A consent decree was entered in the case January 29, 1936, which, among other things, provided that under certain conditions appellant, Panhandle Eastern Pipe Line Company, might apply to the District Court for relief (R. 148-149).

In No. 269 Panhandle Eastern Pipe Line Company made such an application to the District Court (Rec. 412). The appeal is from an order denying that application (R. 565).

In No. 268 Missouri-Kansas Pipe Line Company made a similar application in a derivative capacity on behalf of Panhandle Eastern Pipe Line Company (R. 526). The appeal in No. 268 is from an order denying that application (R. 541).

Jurisdiction of this Court is based on the Expediting Act (15 U. S. C. A., Sec. 29), as follows:

> Sec. 29. *Appeals to Supreme Court.* In every suit in equity brought in any district court of the United States, under any of the laws mentioned in the preceding section, wherein the United States is

complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. (32 Stat. 823, sec. 2; 36 Stat. 1167, sec. 291.)

The "preceding section", namely, section 28, deals with equitable anti-trust suits in which the United States is complainant.

See also:

Missouri-Kansas Pipe Line Co. v. *Columbia Gas & Electric Corp.*, 108 F. (2d) 614; cert. denied, April 22, 1940 (309 U. S. 687);

United States v. *California Co-operative Canneries*, 279 U. S. 553.

In *Missouri-Kansas Pipe Line Co.* v. *Columbia Gas & Electric Corp., supra,* on an appeal to the Circuit Court of Appeals for the Third Circuit that court held that the Supreme Court had exclusive jurisdiction of an appeal from an order denying intervention in a suit in equity under the anti-trust laws brought by the Attorney General. There the appellant in No. 268 sought to intervene under Rule 24 of the Rules of Civil Procedure in the same case in which both appellants here now seek relief. This Court denied certiorari April 22, 1940 (309 U. S. 687).

See Jurisdictional Statements filed herein.

Statement of the Case.

1. Description of Parties Involved.

Columbia Gas & Electric Corporation (hereinafter called Columbia Gas) and Columbia Oil & Gasoline Corporation (Columbia Oil) are the principal defendants.

Columbia Gas is a holding company engaged in the business of recovering and manufacturing natural and artificial gas, and transporting and distributing it principally in Ohio and adjacent states through about sixty subsidiaries which were consolidated together by Columbia Gas (R. 112). Columbia Oil was organized by Columbia Gas (R. 112). All of its preferred stock has been and is owned by Columbia Gas (R. 112, 387); its common stock was originally deposited under a voting trust, certificates being distributed to Columbia Gas stockholders (R. 112).

Panhandle Eastern Pipe Line Company (called Panhandle Eastern) around which all of this controversy centers was organized by Missouri-Kansas Pipe Line Company (R. 113). In the petition in this action the Government alleged that it was intended that Panhandle Eastern should run a natural gas pipe line from the Texas fields to Detroit, and sell and deliver natural gas in the Indiana-Ohio-Michigan area, a region in which the corporate defendants, through numerous subsidiaries, were already serving many places. The Panhandle Eastern line actually reached to the Indiana border in the year 1931. There it was brought to a standstill (Maps R. 540).

Missouri-Kansas Pipe Line Company (called Mokan), the appellant in No. 268, was organized for the purpose of producing, transporting, distributing, and selling natural gas. It caused the organization of Panhandle Eastern and became the owner of the entire capital stock of said corporation (R. 112, 122).

2. Proceedings Heretofore Had Pertinent to These Appeals.

On March 6, 1935, the Attorney General filed an original petition charging Columbia Gas, Columbia Oil and eight individuals with participating in a conspiracy to restrain

and monopolize trade in natural gas in violation of the Sherman Anti-Trust Act including particularly a restraint of any competition by Panhandle Eastern, and with making acquisitions of stock and other share capital of Panhandle Eastern in violation of the Clayton Act (R. 1).

An amended and supplemental petition was filed by the United States on October 30, 1935 (R. 10).

On January 29, 1936, the defendants filed answers and, on the same day, consented that a decree be entered against them, by which, *inter alia,* they were enjoined from exercising "any dominion or control over Panhandle Eastern and from restraining, or interfering in any manner with, the free and independent action of said Panhandle Eastern in the production, transportation, sale or delivery of natural gas" etc. (R. 144).

Three years later, on January 12, 1939, a second supplemental petition was filed by the Attorney-General alleging that up to that time "no steps of any kind have (had) been taken towards the effective termination of all control by Columbia Gas of Panhandle Eastern" and praying that the defendants be directed to submit a plan for compliance with the purposes of the consent decree (R. 281-282). No plan was submitted. No further action occurred until May 15, 1939, when the Attorney-General filed a motion with a proposed third amended and supplemental petition (R. 334) in which he characterized the consent decree as inadequate, ineffectual and a failure, and stated that under the consent decree "Columbia Gas has actually strengthened its position of control (over Panhandle Eastern) since that date", i. e., January 29, 1936 (R. 340).

On June 20, 1939, the defendants filed a proposed "Plan for Modification of the Consent Decree", which purports to comply with the law (R. 356).

On March 23, 1940, the instant application by Panhandle Eastern was filed for relief under express provisions of the Consent Decree that Panhandle Eastern might make such an application (R. 412). The application was denied in an opinion dated April 6, 1940, 32 F. (2d) 474, on the ground that it was unauthorized by the corporation for reasons which will later be explained in more detail (R. 520).

On April 16, 1940, after the opinion aforesaid, a similar, but derivative, application was filed by Mokan (as a Panhandle Eastern stockholder) on behalf of Panhandle Eastern. This application, although filed by Mokan, was solely in the right of Panhandle Eastern and for its benefit (R. 526).

Both applications were denied by orders dated April 23, 1940 (R. 541, 565).

At the date of the filing of the latter application, Mokan owned about 42 percent of the common stock of Panhandle Eastern; Columbia Oil owned 50.08 percent, and the balance was publicly owned (R. 448, 527).

3. Summary of Means Originally Used to Effectuate Conspiracy as Charged by Government.

The defendants had built a "Chinese Wall" to protect their position in the Indiana-Ohio-Michigan territory into which it was proposed to extend the Panhandle Eastern pipe line. The Government complaint charges that the purpose of the conspiracy was to preserve this territory for the Columbia interests by stopping the construction of the pipe line, by preventing it from entering and bringing gas to that region, by gaining control of the line, and, finally, by acquiring complete ownership thereof (R. 14, 27, 28).

Among the means used by the defendants the following are alleged:

Acquisition of Panhandle Stock. By contract dated September 17, 1930 Columbia Oil acquired fifty percent of the total outstanding stock of Panhandle Eastern. At that time Mokan owned all the Panhandle Eastern stock, and Mokan, Columbia Oil and National City Company of New York entered into a contract providing for the acquisition by Columbia Oil of half the Panhandle Eastern stock, for the issuance by Panhandle Eastern of $20,000,000 of first mortgage bonds, for the purchase thereof by National City Company, for the sale and daily delivery by Panhandle Eastern of large quantities of natural gas to Mokan and Columbia Gas (R. 15-20).

Procurement of a majority of the Panhandle Eastern directors. The Panhandle Eastern board consisted of nine directors. The contract provided that four should be named by Mokan and four by Columbia Oil. The ninth was to be a person who should act impartially between the two stockholders, and in the sole interest of the company. But the ninth director was alienated by the defendants, violated the agreement and became a participant with them in the conspiracy (R. 18-19).

Acquisition of Panhandle Eastern first mortgage bonds. $20,000,000 of Panhandle Eastern bonds were to be sold by the National City Company to the general public. The defendants induced the banking company to sell the entire issue to Columbia Oil, and thus the Columbia interests acquired a first mortgage lien upon the physical assets and property of Panhandle Eastern (R. 19-20).

Displacement of an independent Panhandle Eastern management. The defendants promptly removed all the officers and managing personnel of Panhandle Eastern (except Bay, who is one of the defendants herein) and sub-

stituted therefor persons who were responsive to their orders (R. 20).

Obstruction of Mokan in financing Panhandle Eastern. In 1931 Panhandle Eastern issued notes and additional stock to procure funds to go forward with the pipe line. In order to maintain its position of equal control, Mokan had to buy half of such notes and stock. Mokan hypothecated its fifty percent of the notes together with all of its fifty percent of the Panhandle Eastern stock in order to raise the money, using as an hypothecation device a corporation created for the purpose (R. 20-21).

The defendants attempted to persuade bankers and others not to deal with Mokan relative to this transaction, for the purpose of causing it to dispose of or to lose its stock interest in Panhandle Eastern (R. 21).

Refusal to sell gas to Mokan. The defendants, having obtained control of the Panhandle Eastern as aforesaid, first refused to permit it to sell gas to Mokan, as provided in the September 17, 1930 contract, except for resale in non-competitive areas; and, finally, they prevented Panhandle Eastern from selling gas to Mokan on any condition (R. 22-23). Columbia Oil failed to comply with its agreement to cause Columbia Gas to buy gas from Panhandle Eastern (R. 23).

Acquisition of remainder of Panhandle Eastern stock. Due to acts of the defendants, Mokan was forced into receivership (R. 23-24). Thereafter the defendants as part of the combination and conspiracy proposed several plans to acquire the 50% of the Panhandle Eastern stock then owned by Mokan (R. 23-28). In the Amended and Supplemental Petition of the Government filed on October 30, 1935 it is stated that "unless restrained" the defendants

will "either obtain ownership of 100% of the outstanding capital stock of Panhandle Eastern Pipe Line Company and retain ownership of the greater part of the funded debt of said corporation * * * or foreclose on the mortgage trust indenture * * * and thus secure the physical properties and assets of said Panhandle Eastern Pipe Line Company" (R. 27).

The plans of the defendants therefore were to and would have entirely and finally eliminated the Mokan interest in Panhandle Eastern and would have given the defendants complete and unfettered ownership and control over Panhandle Eastern. Thus the objects of the conspiracy would have been consummated.

4. The Consent Decree.

The Government Petition of Oct. 30, 1935, prayed, among other things, that Columbia Oil be required to divest itself of all of the stock and bonds of Panhandle Eastern. This prayer for separation of the controlling corporations from the unlawfully controlled corporation by divestiture of the unlawfully acquired stock, was the same method which had been used in all similar antitrust cases in which the Government has prevailed during fifty years of administration of the antitrust laws, of which there have been about twenty-three.

On January 29, 1936, the United States and the defendants entered into a stipulation for a consent decree, and a consent decree was entered on the same day (R., 138, 142).

The decree appointed a trustee (Gano Dunn) to receive and hold the Panhandle Eastern stock acquired by Columbia Oil and to vote the same (except as to the election of Directors) *as directed by Columbia Oil.* Separation of Columbia Oil and Panhandle Eastern by the eventual sale

or other disposition of the stock was not required. The principal "terms and conditions" with respect to voting as stated in the decree are as follows (the "beneficial owner" being the defendant Columbia Oil):

> (a) To vote said stock for the election of as many directors of Panhandle Eastern as the number of shares thereof may be entitled to elect; Provided, that one of the directors so elected shall be the trustee; and that the remainder shall be selected from among persons recommended by the beneficial owner of said stock, in conference and with the advice of the trustee, * * *;
>
> (b) To vote said stock upon all other questions and matters in which the stock is entitled to vote, as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree (R. 146-147).

The main ostensible object of the decree was to free Panhandle Eastern and enable it to extend its pipe line into the Indiana-Ohio-Michigan area. The decree, therefore, in addition to comprehensive but general injunctive provisions, specifically prohibited any interference with the company in financing such an extension. With reference to any possible financing received from Columbia Gas, the decree stated that it might be furnished—

> only upon terms or conditions which do not in any way, directly or indirectly, presently or potentially, confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern or confer any rights of ownership in the works or properties of Panhandle Eastern except as security for the investment (R., 148).

And to make assurance doubly sure that this particular prohibition should not be evaded, the decree gave Pan-

handle Eastern the right to apply to the court for relief. The decree states in Section IV thereof:

> and in the event that Columbia Gas shall, with respect to any contract or any contractual rights of any kind whatsoever or any property held as security or used in connection with any contract, in any way prevent the free transportation, sale, and distribution of gas by Panhandle Eastern, then upon application to this Court or any court of competent jurisdiction Panhandle Eastern shall have the right (1) to the immediate appointment of a trustee to hold such contract rights or property subject to the purposes and provisions of this decree; (2) to immediate specific performance of any and all contracts with Columbia Gas; and (3) to immediate injunction, both temporary and final, as well as any other appropriate remedy at law or in equity, including any remedy hereunder (R. 148-149).

and further in Section V thereof

> that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof (R. 149).

It is under the provisions of these Sections of the Consent Decree that the applications were made in the Court below, the denial of which forms the subject matter of these appeals.

5. Allegations of Applications Herein Show that Panhandle Eastern is Entitled to Relief Under Sections IV and V of Consent Decree.

(a) The Panhandle Eastern Application.

Panhandle Eastern had made a contract with the Detroit City Gas Company on August 31st, 1935 to supply natural gas to the City of Detroit for fifteen years (R.

187-218). Performance of the contract necessitated the extension of the Panhandle Eastern pipe line from the end of its existing line at the Indiana border to Detroit (R. 414-415).

The Panhandle Eastern application then alleges:

> X. Because of the existence of said contract, and contemplating the construction of said extension, said Decree filed herein January 29, 1936 (paragraph IV) provided for alternate methods of financing, and further provided that if the Detroit extension and the necessary reinforcements to the main line of Panhandle Eastern were constructed with financial assistance secured from Columbia Gas, such "financial assistance (must be) furnished only upon terms or conditions which do not in any way, directly or indirectly, presently or potentially, confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern or confer any rights of ownership in the works or properties of Panhandle Eastern except as security for the investment;"
>
> XI. Notwithstanding said Decree and the further provision therein contained that the defendants were perpetually enjoined from acquiring, directly or indirectly, the whole or any part of the property or assets of Panhandle Eastern, two days after the entry of said Decree, namely, on January 31, 1936, Defendant Columbia Gas, for its own benefit and use, directly acquired from Panhandle Eastern that part of the contract under which Panhandle Eastern owned the right to construct, own and operate the extension from the eastern terminus of the Panhandle Eastern line to the City of Detroit, and by means of its complete control of the Board of Directors of Panhandle Eastern caused the necessary corporate action to be taken to permit such acquisition. Said corporate action was taken before Gano Dunn,

Trustee appointed by and under said Decree herein, had qualified and taken office and was taken at directors' meetings superintended by Charles A. Munroe, one of the defendants herein. Through its wholly owned subsidiary Michigan Gas, Columbia Gas has constructed and now owns and operates said extension, and has received and is now receiving excessive profits therefrom, all in violation of the express provisions of the Decree aforesaid.

XII. By reason of its ownership and operation of said Detroit extension, Columbia Gas has been enabled to take over, dominate and control the markets available to said Detroit extension in Indiana and southeastern Michigan (except the City of Detroit), and to restrain trade and commerce in natural gas by Panhandle Eastern in the said markets and in the Ohio markets of the Columbia companies adjacent to said extension. The map which is hereto annexed and marked Exhibit B (R. 424 B) shows the territory in and about the State of Indiana with the pipe lines of Panhandle Eastern and of the Columbia System as they existed prior to the commencement of this suit. The annexed map which is marked Exhibit C (R. 424 C) shows the same territory and the said lines as they existed on January 29, 1936, the date of the above mentioned Decree herein. The annexed map which is marked Exhibit D (R. 424 D) shows the location of the said Detroit extension together with various laterals therefrom which Columbia Gas has constructed to connect with existing artificial and mixed gas lines which are also shown on said map, such extension of the Columbia System having occurred since the entry of said Decree herein and in order that Columbia Gas might control the markets in the aforesaid territory and enlarge its monopoly so as to include said Indiana and Michigan territory, and to restrain trade and commerce by Panhandle Eastern therein. The City

of Toledo, in the State of Ohio, is twelve miles east of the Detroit extension as shown on said map, and is served by Columbia Gas from its Ohio system. By owning and operating said Detroit extension, Columbia Gas has prevented Panhandle Eastern from competing in the Toledo market, as well as in the other markets in the territory available to said extension, has restrained trade and commerce by Panhandle Eastern therein and has prevented Panhandle Eastern from freely transporting, selling and distributing gas within said territory. Under the terms of a contract between Michigan Gas and Panhandle Eastern, said Gano Dunn as Trustee under said Decree herein, and by the Columbia Gas-dominated Board of Panhandle Eastern, allocation is made of the prices received from the City of Detroit so that an unfair and unreasonable part thereof is paid to and retained by Michigan Gas, all to the detriment of Panhandle Eastern, its stockholders, and the public.

XIII. In addition to the moneys required for the construction of the aforesaid extension, Panhandle Eastern required, for the fulfilment of said Detroit contract, further moneys for the reinforcement of its own line. The above mentioned Decree herein expressly provided that if such financial assistance were procured from Columbia Gas, it must be furnished, as hereinabove set forth, only upon terms which did not (italicizing ours) "in *any* way directly or *indirectly*, presently or *potentially* confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern." Columbia Gas violated said express provision by causing its controlled affiliate, Columbia Oil, to acquire an additional 80,000 shares of the common stock of Panhandle Eastern shortly after the entry of the said Decree with moneys advanced by Columbia Gas, namely, the sum of $2,000,000. which Columbia Gas advanced to Columbia Oil for the express purpose of enabling

the latter to make such payment and to acquire such stock. Said funds when received by Panhandle Eastern were used by it for the said reinforcement of its said line. Such purchase of additional stock gave to Columbia Oil a majority of the common stock of Panhandle Eastern then outstanding, and Columbia Oil still owns such majority, and still owes Columbia Gas said $2,000,000.

While Columbia Oil was and is permitted, under said Decree of this Court, to acquire stock in Panhandle Eastern, such permission was made expressly subject to the further terms of said Decree, including the injunction against acquisition by Columbia Gas of any interest in Panhandle Eastern. The device herein set out was intended to evade the restraint imposed on Columbia Gas by said Decree, and to enable Columbia Gas to acquire an indirect or a potential interest in Stock of Panhandle Eastern having voting rights, and substantial control thereof, all in violation of the express terms of said Decree. At all times since the entry of said Decree the Board of Directors of Panhandle Eastern has been composed of nine persons and since at least the annual meeting of March of 1927, five of said nine have been nominees of Columbia Oil. Said five nominees of Columbia Oil and Gano Dunn, the Trustee aforesaid, have at all times done the bidding of Columbia Oil and Columbia Gas and have at no time taken any steps which would have been for the best interest of Panhandle Eastern if in doing so the interest of Columbia Gas or any of its associates or affiliates would have been injured.

XIV. Columbia Oil was initially organized by Columbia Gas for the purpose of holding certain of the properties and securities of Columbia Gas. The original Board of Directors of Columbia Oil were selected by Columbia Gas and its officers and directors. The management thus put in charge of Colum-

bia Oil by Columbia Gas at its inception has perpetuated itself in control of Columbia Oil at all times since its organization through the solicitation of management proxies and the use of said proxies to continue the same management in office. This has been rendered possible by virtue of the fact that a majority of the stockholders of Columbia Oil are stockholders of Columbia Gas and the officers of Columbia Oil have been stockholders of both Columbia Oil and Columbia Gas practically from the organization of Columbia Oil. At the last Annual stockholders' meeting of Columbia Oil the management proxy committee cast a vote for the same management which consisted of 99.9% of the total votes cast, of which percentage 82.9% in turn represented stock owned and held by persons who were also stockholders of Columbia Gas. The two corporations have at all times been in effect identical in respect of management and control, and have at all times combined and conspired as hereinafter set forth to restrain trade and commerce in natural gas among the States in which Columbia Gas operated and operate directly and through subsidiaries. Through the control which Columbia Gas has at all times had over the business and affairs of Columbia Oil, through the perpetuation of the Columbia Gas management in office and the vote by Columbia Gas stockholders as aforesaid, Columbia Gas has been able to have Columbia Oil join with it in the combination and conspiracy hereinafter set forth and has at all times been able to use Columbia Oil, its officers and directors, as agents and instrumentalities of Columbia Gas in said combination and conspiracy to restrain the sale of natural gas in the territories above mentioned and to aid Columbia Gas to monopolize and attempt to monopolize the trade and commence in natural gas in the territories aforesaid.

XV. The limitations imposed upon the above mentioned Trustee, Gano Dunn, by the provisions of sub-paragraphs (a) and (b) of Section III of the Decree above mentioned and the willingness of the said Gano Dunn to act as the agent and instrumentality of Columbia Gas and Columbia Oil have made it impossible for said Trustee to serve in accordance with the purposes of said Decree as an effective insulator against the control theretofore exercised by Columbia Gas, through Columbia Oil, over Panhandle Eastern and at all times since the entry of said Decree until the present time, Columbia Gas has exercised control and domination through Columbia Oil over Panhandle Eastern in restraint of trade in natural gas in the territories aforesaid and has thereby protected and strengthened its monopoly in the States of Ohio, Michigan, Indiana and adjoining territories.

XVI. In anticipation of further financing of Panhandle Eastern for the reinforcements of its line and the construction of said Detroit extension, Columbia Gas and Columbia Oil, in violation of said Section IV of said Decree, undertook to and did cause to be issued to Columbia Oil the following shares of preferred stock of Panhandle Eastern: (1) 100,000 shares Class A, $6 accumulative and participating preferred stock having a par value of $100. per share, each of said shares having voting rights share for share with the common stock on all matters excepting the election of directors; (2) 10,000 shares of Class B, $6. preferred stock of the par value of $100 per share. This preferred stock is entitled to vote share for share with the common, and in addition thereto is entitled, as a class, to elect. two directors of Panhandle Eastern. Said 10,000 shares was created and issued to Columbia Oil pursuant to the provisions of a settlement agreement entered into between the Columbia Gas and Columbia Oil

and Receivers of Missouri-Kansas Pipe Line Co., a Delaware Corporation, sometimes herein referred to as Mokan. In the negotiations leading up to said settlement agreement, officers of Columbia Gas stated that they would not make a settlement with the Mokan Receivers of claims which said Mokan Receivers then had against the Columbia Gas and Columbia Oil, unless said Mokan Receivers would agree that said issue of Class B preferred stock be created and issued to Columbia Oil and be non-redeemable and non-callable and containing the provision that it should have the right to elect two directors of Panhandle Eastern. Said officers of Columbia Gas on its behalf stated that neither they nor Columbia Gas would agree to any settlement with said Receivers of Mokan unless Columbia Gas and Columbia Oil were given control on the Board of Panhandle Eastern. Said negotiations were had and said statement made after the entry of said Decree aforesaid and were directly contrary to the terms and provisions of said Decree.

The prayers of the application are as follows:

(1) That an order be entered herein allowing it to file this application and be made a party for the limited purpose of enforcing the rights conferred by Section IV of the consent decree entered herein on January 29, 1936, as is provided by Section V of said Consent Decree.

(2) That a trustee be appointed to hold all the stock of Michigan Gas and all interest of Columbia Gas in said Company, and that Columbia Gas be ordered to turn over such stock and interests to such trustee to be held by him for the benefit of the Panhandle Eastern, subject only to repayment to Columbia Gas of sums actually advanced by it for the purpose of construction of the aforesaid pipe line, less any dividends and all other moneys received

directly or indirectly by Columbia Gas from profits made by said Michigan Gas and provided any balance due to Columbia Gas shall be a first charge on the assets and earnings of the trust estate.

(3) That the trustee herein, Gano Dunn, be directed forthwith to deliver up and surrender to Panhandle Eastern 80,000 shares of its capital stock received as mentioned in paragraph XIII herein, and that the defendants Columbia Oil and Columbia Gas be directed to receive in lieu thereof a security which does not in any way directly or indirectly, presently or potentially, confer on Columbia Gas any voting rights, control or participation in the management of, Panhandle Eastern.

(4) That said trustee, Gano Dunn, be directed to vote the common stock and the 100,000 shares of Class A preferred stock and the 10,000 shares of Class B preferred stock of Panhandle Eastern so that the provisions of such preferred stock may be suitably amended to eliminate any and all right of the holders thereof to vote on any matter whatever, including the election of directors.

(5) For such other and further relief as to the Court may seem appropriate under the provisions of said Section IV of said Decree.

The Panhandle Eastern application is signed by Arthur G. Logan and Logan & Duffy as attorneys for the corporation. In Paragraph XX of said application the following is stated:

XX. That annexed hereto and marked Exhibit E (R. 425) is a copy of certain resolutions duly adopted at the Annual Meeting of Stockholders of Panhandle Eastern duly called and held on the 11th day of March, A. D. 1940 under the provisions of which this application is made. Said resolutions were proposed at said meeting and after being seconded, received

the affirmative vote of persons and proxies at said meeting representing 373,600 shares of the common stock of Panhandle Eastern. All stockholders and proxies present at such meeting voted for said resolutions, except the management proxy, who represented 5,380 shares, and Harold B. Howard, proxy for 109 shares, neither of whom voted on the resolutions, and Gano Dunn, the Trustee for Columbia Oil under the terms and conditions of the Consent Decree entered herein on January 29, 1936, who sought to vote against the resolutions, which vote by the said Gano Dunn was, however, improperly and illegally cast.

That said letter of January 15, 1940 referred to in said resolutions demands inter-alia that Panhandle Eastern:

"4. Intervene in the proceedings pending in the United States District Court for the District of Delaware as provided in Paragraph V of the decree of said court entered on January 29, 1936 and request that the Columbia companies be held in contempt by virtue of their violations of Paragraph IV of said decree and pray that the Columbia companies be required to sell to Panhandle Eastern all the stock of Michigan Gas Transmission corporation for the total investment of said companies in said corporation less dividends and all other monies received, directly or indirectly, by Columbia Gas & Electric Corporation from profits made by said Michigan Gas Transmission Corporation by virtue of the contract of March 17, 1936" (R. 423).

The record contains a complete transcript of the proceedings held at the annual meeting of Panhandle Eastern on March 11, 1939 (R. 428-487), the pertinent part of which, relating to the resolution mentioned in Paragraph XX of the application above, is found on pages 461 to 463.

Other parts of the minutes of said annual meeting should be considered in order to fully understand the voting instructions given to Gano Dunn by Columbia Oil. We will discuss these hereinafter. We merely point out now that at the time Mr. Dunn voted to defeat the resolution the following took place:

> Mr. Logan: Mr. Dunn, may I ask if you were directed by Columbia Oil & Gasoline Corporation to vote against that resolution?
>
> Mr. Dunn: I don't recognize your right to ask the question.
>
> Mr. Hand: May I have noted or the record that I object to the vote of Mr. Dunn unless in compliance with his Trust and evidence of compliance with his Trust be shown here. By that I mean, some evidence to show us that he is acting in accordance with the wishes of his principal when he votes as he does on this question.
>
> Mr. Logan: I must point out at this time that this motion is one for this corporation to bring law suits against Columbia Oil & Gasoline Corporation. Mr. Dunn has no right to vote on that motion unless he is directed by Columbia Oil & Gasoline Corporation. If he is voting because he was directed by Columbia Oil & Gasoline Corporation to vote against it, this corporation should not receive his vote. If he was not, he has no right to vote, and I demand that the Chair reject his vote and declare the resolutions adopted.
>
> The Chairman: The Chair declares that the resolution was lost (R. 462).

Upon an appeal from this ruling, the Chair held that it had been sustained by the vote of Mr. Dunn (R. 463).

(i) Motions to Dismiss Panhandle Eastern Application filed by Columbia Gas and Columbia Oil.

Columbia Gas filed a motion to dismiss the application of Panhandle Eastern on the ground that the application was not signed or verified by Panhandle Eastern and that the attorneys whose names appeared thereon were not attorneys for Panhandle Eastern and were not authorized to act on its behalf (R. 426).

Columbia Oil filed a motion to dismiss the application of Panhandle Eastern on the ground that said application was not authorized by Panhandle Eastern; that the attorneys whose names appeared on said application were not authorized by that Company to act on its behalf and that Gano Dunn as Trustee of the Columbia Oil stock duly voted the Columbia Oil stock to defeat a resolution, introduced at the annual stockholders' meeting of Panhandle Eastern on March 11, 1940, that Panhandle Eastern should make this application and that he voted said stock in accordance with the provisions of said consent decree and pursuant to valid directions from Columbia Oil (R. 514-515).

(ii) Ruling on Motion to Dismiss.

The Court below stated that: "The sole question raised by the motion to dismiss is whether Panhandle Eastern has made a 'proper application' to become a party to this suit" (R. 520). The Court then reviewed proceedings had at the annual meeting of stockholders of Panhandle Eastern on March 11, 1940, at which time a resolution was introduced as aforesaid to have Panhandle Eastern make the instant application. The Court below ruled that the resolution had been defeated by the vote of the Columbia stock standing in the name of Gano Dunn as Trustee and

the Court said that Gano Dunn had "duly voted the shares of stock of Panhandle Eastern * * * in accordance with provisions of said consent decree, and pursuant to valid directions from Columbia Oil." (R. 526).

(b) The Mokan Application.

After the Court below ruled that the Panhandle Eastern application was unauthorized, Mokan filed an application in its derivative capacity on behalf of Panhandle Eastern. This application was filed on April 16, 1940 (R. 526-541). This application is almost identical with the Panhandle Eastern one aforesaid, except that it is in a derivative capacity rather than in a primary one. The prayers seek for Panhandle Eastern the same relief which the Panhandle Eastern application sought. The application sets forth the following allegations in order to show that Missouri-Kansas was entitled to make application in its derivative capacity as a stockholder of Panhandle Eastern:

> XXII. On or about January 15, 1940 and at other times heretofore, Mokan as the owner and holder of 339,275 shares of the common stock of Panhandle Eastern made demand upon Panhandle Eastern and the officers and directors thereof including Gano Dunn above mentiond that this or a like application be made by Panhandle Eastern for relief to which Panhandle Eastern is entitled under Sections IV and V of said Decree, but Panhandle Eastern, its officers and directors, have neglected and refused and still neglect and refuse to take any action whatsoever. The reason Panhandle Eastern, its officers and directors have not taken action is that said Board is controlled by said Gano Dunn and five nominees of Columbia Oil who are acting in concert with Columbia Gas and Columbia Oil to restrain trade in natural gas as aforesaid to the great loss and damage of

Panhandle Eastern. At the annual meeting of stockholders of Panhandle Eastern held on March 11, 1940, resolutions were proposed that Panhandle Eastern take the action which Mokan had demanded on January 15, 1940, including filing an application in its own name as Mokan is doing on its behalf by this application. Said resolutions, after being seconded, received the affirmative vote of persons and proxies totalling 373,600 shares of the common stock of Panhandle Eastern Pipe Line Company. All stockholders and proxies present at such meeting voted for said resolutions, except the management proxy, who represented 5,380 shares, and Harold B. Howard, proxy for 109 shares, neither of whom voted on the resolutions, and Gano Dunn, the Trustee for Columbia Oil under the terms and conditions of the Consent Decree entered herein on January 29, 1936, who voted against the resolutions; whereupon, the Chairman declared that the same had been defeated. The said Gano Dunn so voted pursuant to general instructions from Columbia Oil & Gasoline Corporation.

On April 16, 1940, the day the application was filed, an order was entered directing that a hearing be had on such application on April 23, 1940, and directing that all parties to the cause be served with copies of the application and that at such hearing they appear and show cause why said application should not be granted (R. 541).

The application came on for hearing on April 23, 1940, pursuant to the order aforesaid. After argument, an order was entered denying the application (R. 541-2). The Court rendered no verbal or written opinion.

From the orders denying both applications, these appeals are taken.

Specification of Assigned Errors to Be Urged.

1. With respect to the Application of Panhandle Eastern, appellant relies upon all of the errors assigned by it in its "Assignment of Errors." (R. 576-577).

2. With respect to the Application of Mokan, appellant relies upon all of the errors assigned by it in its "Assignment of Errors" (R. 550-1).

ARGUMENT.

Summary of Argument:

(1) The allegations contained in the applications of Panhandle Eastern and Mokan were denied without any responsive pleadings having been filed thereto and without any trial or hearing on the merits. Said applications state facts legally sufficient to entitle Panhandle Eastern to relief under Sections IV and V of the Decree of January 29, 1936, in that said allegations show that the defendants, Columbia Gas and Columbia Oil have committed the very acts, and accomplished the very purposes which the Decree was designed to prevent. Specifically, the Decree provides that if any financial assistance be secured from Columbia Gas (relating particularly to the Detroit extension and the reinforcing of the Panhandle Eastern line) such assistance must be furnished upon terms which do not, directly or indirectly, presently or potentially, confer upon Columbia Gas voting rights, control or participation in the management of Panhandle Eastern or rights of ownership in the works or properties of Panhandle Eastern other than as security for the investment. The Applications herein allege that Columbia Gas in violation of said Decree has *directly acquired* and now owns the Detroit

extension, and has *indirectly acquired* additional voting securities of Panhandle Eastern.

(2) The application of Panhandle Eastern filed herein for the relief to which it is entitled under Sections IV and V of the Decree, was authorized by that corporation. A resolution proposed at the annual meeting of stockholders of Panhandle Eastern on March 11, 1940 providing for the preparation and filing of such application was duly passed because it was voted by all stockholders other than Gano Dunn, Trustee. The votes cast by the Trustee against said resolution should have been rejected as they were inconsistent with the purposes of the decree; and said Trustee was not qualified to vote upon said resolution, either pursuant to instructions from Columbia Oil or as Trustee, because the resolution proposed an action against Gano Dunn, as trustee, and against Columbia Oil.

(3) In the event the Court below did not err in holding that the Panhandle Eastern application was unauthorized, then the Court below erred in denying the derivative application of Mokan because (1) the allegations of the Mokan application state a cause for relief on behalf of Panhandle Eastern under Sections IV and V of the consent decree; and (2) the allegations of said Mokan application show that Mokan as a minority stockholder of Panhandle Eastern complied with all conditions precedent to the assertion by it of derivative rights in equity, including the right to the relief sought by it for Panhandle Eastern.

POINT I.

The allegations contained in the applications of Panhandle Eastern and Mokan state facts legally sufficient to entitle Panhandle Eastern to relief under Sections IV and V of the decree of January 29, 1936.

We have set forth under the Statement of Facts the principal allegations contained in the Panhandle Eastern application, paragraphs X to XVI, inclusive, which show that Panhandle Eastern is entitled to relief under Sections IV and V of the consent decree. (See *supra*, pp. 12-19, inclusive.) Similar allegations are contained in the Mokan application (R. 530 to 535, inclusive).

No responsive pleading was filed to either application. Motions to dismiss were filed with respect to the Panhandle Eastern application, but said motions were directed solely to the question of whether or not Panhandle Eastern had authorized the filing of the application (R. 426, 514). The motions were supported by affidavits setting forth the proceedings had at the annual meeting of stockholders on March 11, 1940 and the instructions which were said to have been given to Gano Dunn, as trustee, by Columbia Oil. The Court below recognized that the motions did not raise any question concerning the merits of the Panhandle Eastern application both when it stated in the opinion that:

> "The sole question raised by the motion to dismiss is whether Panhandle Eastern has made a 'proper application' to become a party to this suit." (R. 520).

and when it concluded that Gano Dunn had "duly voted the shares of stock of Panhandle Eastern * * * in accordance with provisions of said consent decree, and pursuant to valid directions from Columbia Oil." (R. 526).

Not only were no responsive pleadings filed, but the Court below recognized in making its ruling and in denying the application that no question on the merits of the application was involved. The motions to dismiss the Panhandle Eastern application tested only the sufficiency of the authority by which the application was filed. The motions to dismiss set forth affirmative matters, namely, the proceeding had at the annual meeting of stockholders, and the Court below considered such matters. The motions constituted, therefore, an affirmative defense under Rule 8(c) of the Rules of Civil Procedure for the District Courts. As there was no denial of the allegations concerning the violations of the anti-trust laws or of the acts giving rise to the claim for relief under Sections IV and V of the decree, said allegations, under Rule 8(d), must be considered as having been admitted by the defendants. If not admitted for all purposes, at least said allegations must be considered as admitted for the purposes of this appeal.

The allegations of both applications show facts which clearly entitle Panhandle Eastern to relief under Sections IV and V of the consent decree.

As we have stated in the summary above, the decree provides that if any financial assistance be secured from Columbia Gas (relating principally to the Detroit extension and the reinforcement of the Panhandle Eastern line) such assistance must be furnished upon terms which do not directly or indirectly, presently or potentially, "confer upon Columbia Gas any voting rights, control or participation in the management of Panhandle Eastern or confer any rights of ownership in the works or properties of Panhandle Eastern except as security for the investment". The applications state fully and clearly that the defendant Columbia Gas, *since the entry of the consent decree,* has

directly acquired "rights of ownership in the works or properties of Panhandle Eastern" and has *indirectly acquired* additional voting securities of Panhandle Eastern. Under these circumstances, a sufficient showing is made to entitle Panhandle Eastern to the relief prayed for.

POINT II.

The application of Panhandle Eastern filed herein for the relief to which it is entitled under Sections IV and V of the decree was authorized by that Corporation.

The votes cast by Gano Dunn as Trustee should have been rejected.

The final clause of the consent decree is under Section V and provides:

> "That Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

The decree must be construed in such a way that under appropriate circumstances the above quoted clause could have some effect.

The purpose of Section IV was to extend to Panhandle Eastern the protection of the basic principle of non-interference in connection with the Detroit contract, and especially in the reinforcement of the existing line and the construction, ownership and operation of the new Detroit extension. Section IV strongly fortified that principle by giving Panhandle Eastern the means of self-protection in this regard.

Against whom could Panhandle Eastern possibly enforce "the rights conferred by Section IV hereof"?

An examination of Section IV shows that the only rights therein conferred are against the defendants in the anti-trust suit, the principal of whom are Columbia Gas and Columbia Oil. Therefore, the right to enforce, which was provided for Panhandle Eastern in Section V, must have been intended as a right against Columbia Gas and Columbia Oil. The application of Panhandle Eastern now before this Court was denied by the Court below on motions of Columbia Gas and Columbia Oil with the statement by the Court that "the sole question raised by the motion to dismiss is whether Panhandle Eastern has made a 'proper application' to become a party to this suit". Whether the application was a proper one depends upon whether the stockholders of Panhandle Eastern at the annual meeting on March 11, 1940, by resolution, authorized certain attorneys to make the application on its behalf. Whether such resolution was adopted by the stockholders at said meeting depends on whether it could be defeated by the vote of Gano Dunn, trustee (holder of record of a majority of Panhandle Eastern voting shares) voting pursuant to instructions of Columbia Oil.

If the provision of the consent decree, Section III (b), is construed to permit Columbia Oil to defeat, by instructing a voting trustee to vote against, a resolution directing intervention pursuant to the above quoted clause in Section V, then that clause of Section V must be a nullity, since it could not possibly be directed against any other than Columbia Oil and its affiliate, Columbia Gas.

Since that would not be a reasonable construction, it must follow that Section III (b) is subject to some limitation, and that limitation is found in Section III (a) which provides for the vote by the trustee of the trusteed stock

for the election of directors, and makes such voting "subject, however, in this as well as in the exercise of all other powers to the authority of this Court upon the motion and showing of any party hereto, or upon its own motion, to restrain said trustee from abuses of sound discretion, in view of the purposes of this decree and the law under which it is entered, or in case said trustee does not act in good faith hereunder." The very purpose of the stockholders' resolution was to bring before the Court a question of the sound discretion and good faith of the trustee. Surely the trustee had no right to vote on a resolution impugning his own sound discretion and good faith; and still less could he do so on direction of the beneficial owner of this stock, the very party against whom relief is sought by the resolution!

Whether or not Panhandle Eastern is entitled to the relief sought is not yet at issue; the sole question is whether under any conceivable circumstances it can assert the right Section V seems to give it, to become a party to the suit. If the only possible parties against whom relief could be sought can prevent intervention of Panhandle Eastern by directing the negative vote of a controlling block of stock, in violation of the express injunction of the decree, and then have that vote sustained on motion of the same offending parties, it must follow that there is no circumstance under which the quoted clause from Section V could possibly operate.

Furthermore, the fiduciary position occupied by Columbia Oil as the equitable owner and Gano Dunn as the legal owner of the majority stock of Panhandle Eastern should require a court of equity to bar them from using that position to prevent the corporation from asserting rights against them. *Pepper* v. *Litton*, 308 U. S. 295.

POINT III.

If the application of Panhandle Eastern was not authorized then the application of Mokan should have been entertained by the Court below.

After the court below had denied the application filed in the name of Panhandle Eastern on the ground that it had not been authorized by that corporation, Mokan filed a similar application as a stockholder of Panhandle Eastern in a derivative capacity. The application states that Mokan sought to have Panhandle Eastern, its directors and stockholders make the application, but they had wrongfully neglected and refused to do so (R. 527, 538). See *supra,* pp. 23, 24. Although the defendants objected to the application at the hearing, no objections in the form of written pleadings were filed. The application was peremptorily denied at the close of the hearing. No verbal or written statement of reasons was made by the court.

The proceeding below, in which the application was made, is one in equity. The consent decree is one entered by a Court of Equity.

A decree in equity is to be construed in accordance with the general principles of equitable jurisprudence. It is a corollary of this rule that a decree, being an act in the exercise of the equitable jurisdiction, is to be construed to contemplate and authorize the use of all the actions, forms and modes of relief and procedure established by the principles of equity, and which may be necessary and appropriate for its effectual administration. Such a construction should be applied to Sections IV and V of the decree which give Panhandle Eastern the right to relief. Indeed, the following statement of that right in the decree strongly supports that construction:

> Upon *application to this court* or any court of competent jurisdiction Panhandle Eastern shall have the right (1) to the immediate appointment of a trustee to hold such contract rights or property subject to the purposes and provisions of this decree; (2) to immediate specific performance of any and all contracts with Columbia Gas; and (3) to immediate injunction, both temporary and final, as well as *any other appropriate remedy at law or in equity*, including any remedy hereunder (R. 149).

The application by Mokan is an application to the Court for an appropriate remedy in equity, which is thus specifically mentioned in the decree.

Under general rules of equity a stockholders' suit by Mokan in behalf of Panhandle Eastern, *outside of the decree*, would lie. Mokan's derivative application is an equally appropriate procedure to make use of the right of Panhandle Eastern *under* the decree.

Under general principles of equity (which are incorporated in the decree), Mokan may act for Panhandle Eastern in procuring relief under the decree, because the defendant, Columbia Oil, owns and controls the majority of the Panhandle Eastern shares and it names and controls a majority of the Panhandle Eastern directors. The defendants, including Columbia Oil, are charged in the application with engaging in unlawful and wrongful acts and transactions in respect of the affairs and business and interstate trade and commerce of Panhandle Eastern. The interest of the defendants is in conflict with the interest of Panhandle Eastern and of the minority stockholders, they are acting in a manner injurious to Panhandle Eastern and the rights of other shareholders, and they have refused to cause Panhandle Eastern to make a direct application.

Pepper vs. *Litton*, 308 U. S 295, 84 L. ed. 281 (Dec. 1939) 306-307:

> "A director is a fiduciary. *Twin-Lick Oil Compdny* vs. *Marbury*, 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. *Southern P. Company* vs. *Bogert*, 250 U. S. 483, 492. Their powers are powers in trust. See *Jackson* vs. *Ludeling*, 21 Wall, 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* vs. *Anaconda Copper Min. Company*, 254 U. S. 590, 599. * * * normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action."

The trustee is likewise a fiduciary. That is the precise and preeminent status in which he is placed by, and which is necessary to accomplish the object of, the decree. Acts which constituted a violation by the defendants of a fiduciary duty to Mokan constitute the main reason for his appointment.

When, as here, the officers, directors and majority stockholder are unable or unwilling to act, the corporation cannot act, and Courts of Equity permit minority stockholders to sue for the protection of the corporation in which they have an interest.

Ashwander vs. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. ed. 688;

Flynn vs. *Brooklyn R. Co.*, 158 N. Y. 493, 53 N. E. 520;

Brinkerhoff vs. *Bostwick*, 88 N. Y. 52;
Hawes vs. *Water Works*, 104 U. S. 450;
Delaware & Hudson Co. vs. *Albany & Susquehanna Co.*, 213 U. S. 435, 451;
United Copper Securities Co. vs. *Amalgamated Copper Co.*, 244 U. S. 261;
Carter vs. *Carter Coal Co.*, 298 U. S. 238;
Hyams vs. *Calumet & Hecla Mining Co.*, 221 Fed. 529;
Thompson, Corporations, 3d ed., secs. 4560-4566;
Druckerman v. *Harbold*, 174 N. Y. Misc. 1077, at 1078;
Eshleman v. *Keenan*, 194 Atl. 40 and 2 Atl. (2d) 904;
Ainscow v. *Sanitary Co. of America*, 180 Atl. 614;
Fleer v. *Frank H. Fleer Corp.*, 14 Del. Ch. 277, 125 Atl. 411;
Sohland v. *Baker*, 15 Del. Ch. 431, 141 Atl. 277.

The broad scope of the decision of this Court in the case of *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 80 Law Ed. 688, indicates that Mokan's application in a derivative capacity, in the event Panhandle Eastern was prevented from proceeding through the negative vote of Gano Dunn, should have been granted. Gano Dunn, both in his capacity as majority stockholder and as the one who had control over a majority of the board of directors through his appointive powers under the consent decree, was not willing to have Panhandle Eastern assert or test its right to relief under Sections IV and V of the decree. If Dunn is sustained, then the fact that he would not let the corporation assert its rights, gave Mokan, a minority

stockholder, a right to apply for the relief. In the *Ashwander* case, this court pointed out that where directors were "reluctant to decide constitutional questions" and thus bar a test of rights of the corporation (similar to the bar set up by Gano Dunn to prevent Panhandle Eastern from testing its rights) a minority stockholder should be given "the opportunity to resort to equity, in the absence of an adequate legal remedy, in order to prevent illegal transactions by those in control of corporate properties" and this court pointed out that such right in the minority stockholders "should not be curtailed because of reluctance" of those in control to have the right asserted.

Delaware & Hudson Co. vs. *Albany & Susquehanna Co.*, 213 U. S. 435, 451:

> "The situation was unique. The company whose interest it was to assert the right of payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. And though there are allegations in the bill of contrary import, the good faith of the directors need not be questioned. They might, notwithstanding, be firm in their views, —firm to resist appeals against them. Their views seemed to persist through many years. At any rate, a situation was presented fully as formidable to the interest of stockholders in the Susquehanna Company as that presented in the Harrington Case. And it may be well doubted whether the directors of the Susquehanna Company, so being directors of the Delaware Company, and who, either from an apathy that endured through many years, could discern no right in that company to assert, or, through conviction of the absence of right, were the best agents to begin or conduct a litigation of such right. It was certainly natural enough that a stockholder should seek more earnest representatives, and consider that

the directors 'occupied', to use the language of *Dodge* vs. *Woolsey*, 'antagonistic grounds in respect to the controversy' as to him. The attitude of the directors need not be sinister. It was so in *Chicago* vs. *Mills*, 204 U. S. 321, and *Ex parte Young*, 209 U. S. 123, and other cases."

Hyams vs. *Calumet & Hecla Mining Co.*, 221 Fed. 529 (C. C. A. 6, 1915):

"The *Bigelow* case does not, however, decide that a court of equity could not, and should not, give appropriate relief, for the protection of the interests of minority stockholders, on proof of a purpose on the part of the controlling corporation to absolutely dominate the controlled company, and the existence of a substantial conflict of interest between such companies, accompanied by an actual attempt to accomplish a prejudicial domination. On the other hand, the rule, independently of state or national anti-trust statutes, is fundamental that one in control of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority interests. Every act in its own interest to the detriment of the holders of minority stock becomes a breach of duty and of trust, and entitled to plenary relief from a court of equity. *Jackson* vs. *Ludeling*, 88 U. S. (21 Wall.) 616, 624, 625; *Jones* vs. *Electric Co.* (C. C. A. 8), 144 Fed. at page 771; *Wheeler* vs. *Abilene etc. Bldg. Co.* (C. C. A. 8), 159 Fed. 391, 394 395; 3 *Clark & Marshall on Corporations*, at page 2289 (p. 537).

* * * * * *

The bills allege lack of collusion, and the record negatives its existence. The suit, if successful, would be detrimental to the interests of the majority of the directors of the Isle Royale and Tamarack, in their capacities as directors and stockholders in the

> Calumet & Hecla, and the latter company practically held sufficient voting power to control the stockholders' meetings of both the Tamarack and Isle Royale. Under these circumstances, the prosecution of these suits should not be intrusted to the officers and directors of the Tamarack and Isle Royale; moreover, presumptively any request for such action addressed to either directors or stockholders, would have been unavailing. Such request was therefore unnecessary. *Delaware & Hudson Co.* vs. *Albany, etc., Ry. Co.*, 213 U. S. 435, 446, and following, and cases th re cited; *Rogers* vs. *N. C. & St. L. R. R. Co.* (C. C. A. 6) 91 Fed. at page 307 and following, and page 313'' (pp. 537-538).

In the cases cited above the courts have set forth conditions precedent to the maintenance of a derivative stockholders action in equity, *i. e.*; (1) that the corporation has a cause of action against third parties; (2) that the corporation has not asserted it and (3) that demand has been made on the directors and majority stockholders and they have refused to assert the cause of action. Mokan alleges compliance with all of these conditions precedent.

If Columbia Oil, the majority stockholder, can use its control to prevent direct action by Panhandle Eastern, the right given to Panhandle Eastern by the decree is a nullity unless it is available to Mokan in a derivative capacity.

Conclusion.

Either the decree denying the application of Panhandle Eastern should be reversed or, if affirmed, then the decree denying the application of Mokan should be reversed. In either event, this Court should direct the Court below to entertain the appropriate application and grant to the applicant as a party a hearing on the merits of the claim to relief.

Respectfully submitted,

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